S. S. WORKMEN'S COMPENSATION REPORT.

[WORKMEN'S COMPENSATION]

McFALL, COMMISSIONER.

November 22, 1937.

EXTRA ASSISTANT CONTROLLER OF LABOUR, PENANG, on behalf of Natarajan

v.

ADAM HAJEE PEERMOHAMED ESSACK AND ANOTHER.

[PENANG WORKMEN'S COMPENSATION

No. 615 of 1937]

Workmen's Compensation Ordinance (Cap. 70), S. 15—Employment of Gang of Workmen—Pro rata division of earnings — No direct dealing between employer and individual workman—Injury to member of gang—Compensation.

A firm of dealers in and exporters of such commodities as sago and areca nuts from Penang were in the habit of giving to a gang of workmen jobs of loading bags of sago in tongkangs or lighters. The gang of workmen had a headman or **tindal.** While carrying a bag of sago from shore to a tongkang, N., one of the workmen, became entangled in a rope in the tongkang and fell into the tongkang with his bag whereby he received injuries involving total disablement. It was established in evidence that the amount earned by the gang was divided up and entered to the credit of each man daily, the headman getting 2 shares and the other members 1 share each of the amount and that all accounts were settled once a month, although the headman made advances to the members from time to time. A workman of the gang could work or not as he pleased; if he did not work, nothing would be credited to his account for that day. As between N. and his tindal, he drew no fixed wage or retaining fee, need not work when he liked and could leave without giving notice. N. claimed compensation.

Held, that notwithstanding the absence of direct dealing between the firm and N. they were his employers and as such liable to pay compensation to him for the accident.

Bobbey v. Crosbie, (1915) W.N. 406; 9 B.W.C.C. 142, followed.

Held further, that the headman of the gang was not a contractor within Section 15 of the Workmen's Compensation Ordinance (Cap. 70) nor an employer of N.; he (the headman) was therefore not liable to pay compensation nor to indemnify the firm.

Cases referred to:—

(1) *Bobbey v. Crosbie,* (1915) W.N. 406; 9 B.W.C.C. 142.

(2) *Wilmersen v. Lyme & Hamburg S.S. Co.,* (1913) 29 T.L.R. 652.

[The above decision was followed by **Forrer,** Commissioner of Workmen's Compensation, in **Extra Assistant Controller of Labour v. Mehar Chand Dooa & Co. & Another,** Workmen's Compensation 942/38, in which the facts are similar.—Editor, M.L.J.]

McFall, Commissioner.—1. Applicant Natarajan is a Tamil workman young and of good physique and he is a "workman" as defined under Head H Second Schedule to the Workmen's Compensation Ordinance.

First Respondent Adam Hajee Peermohamed Essack is a firm dealing in and exporting commodities such as sago and areca nuts from Penang.

Second Respondent Munisamy is a tindal or headman of a gang of 30—40 workmen of which applicant was one.

2. The immediate history of the accident to the applicant workman is short and undisputed.

About 7 a.m. on 9th July, 1937 2nd Respondent took 10 or 12 workmen of whom applicant was one to 1st Respondent's business premises. There 2nd Respondent got from 1st Respondent the job of sewing up some bags of 1st Respondent's already filled with sago for export at a Chinese shop some distance off, going with the bags so sewn up to Weld Quay, and there putting them into tongkang P 104 to be taken off to a ship lying in Penang Harbour.

2nd Respondent's workmen prepared the bags by sewing them up and 4 of the workmen including the applicant went with the bags to Weld Quay, and there began loading them in P 104 about 9.30 a.m. While carrying a bag from shore to tongkang the applicant became entangled in a rope in the tongkang and fell into the tongkang with his bag and received his injury.

Next day he went to Penang Hospital where he was found to have a fracture of the 3rd vertebra and also of the 12th dorsal vertebra. He was put into a plaster jacket in which he still remains at the date of hearing.

Applicant has not worked and could not work at his accustomed work since: At the moment applicant had a total disablement.

3. Applicant did not give notice of the accident to either Respondent. 2nd Respondent did pay applicant wages up to 31st July 1937 in compassion. At the trial Counsel for both Respondents waived any objection to lack of notice of accident. In any event failure to give notice has not embarrassed or prejudiced the Respondents in the case. The deputy Controller of Labour took up applicant's accident and commenced the present proceedings against both Respondents on behalf of the workman.

Both Respondents were served with copies of application and applicant's statement, and this enquiry at which both 1st and 2nd Respondents were represented by Counsel was held. The procedure of having 1st and 2nd Respondents as parties in one enquiry in such cases as the present is correct and convenient.

4. A lot of evidence has been recorded and examined. One unconvincing witness gave evidence which tended to show that applicant was the worse of liquor at the time of the accident. Applicant is not found the worse of liquor or guilty of any misconduct at the time of the accident.

5. The questions for decision are of importance. They arise under Section 15 of the Workmen's Compensation Ordinance (Chapter 70) which runs as follows:—

15.—(1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purpose of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workmen employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him, and where compensation is claimed from the principal, this Ordinance shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and the amount of any such indemnity may, in default of agreement, be settled by the Commissioner.

(3) Nothing in this section shall be construed as preventing a workman from recovering compensation under this Ordinance from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management.

The questions are:—

(1) Is 1st Respondent liable as principal to pay compensation to the applicant?

(2) Is 2nd Respondent liable as contractor to pay compensation to the applicant?

(3) Is 1st Respondent liable as employer to pay compensation to the applicant?

If 2nd Respondent is liable to pay compensation to the applicant then 1st Respondent on paying compensation to the applicant is entitled to be indemnified by 2nd Respondent.

6. 1st Respondent is in his business an exporter of sago. Applicant worked on 1st Respondent's sago at the Chinese shop sewing up the bags which had been filled, going with them to the tongkang and placing them in the tongkang. 1st Respondent's clerks were present at the Chinese shop superintending the bagging and sewing up and arranging for the lorry to carry the workmen and bags to the tongkang. 2nd Respondent was not there most of the time. 1st Respondent's clerks were going about there in charge. It is clear that 1st Respondent in the course of or for the purpopse of his trade or business employed 2nd Respondent (or applicant) to do certain work, that applicant was injured in the doing of that work. In my opinion it is immaterial whether 1st Respondent engaged 2nd Respondent as contractor and 2nd Respondent thereupon engaged applicant as workman, or whether 1st Respondent engaged 2nd Respondent and applicant as fellow workmen in either event 1st Respondent is liable to pay compensation to applicant for this injury received in the circumstances proved.

7. It was the second question whether 2nd Respondent is a Contractor under Section 15 and liable to indemnify 1st Respondent which called forth so much evidence and presented difficulty.

From the evidence it appears that 2nd Respondent has about him 30 or 40 workmen who, for convenience, may be termed a gang. 1st Respondent, and two other firms, give such jobs of work as they have to do from time to time to 2nd Respondent's gang, giving 2nd Respondent notice of work to be done or giving it to him when he enquires. The gang all know the

rate and value of the job done, and the amount earned for the job is divided up and entered to the credit of each man daily the 2nd Respondent getting two shares and the other members one share each of that amount. All the accounts are settled once a month, but 2nd Respondent makes advances to members from time to time as they ask for them.

A workman of the gang can work or not as he pleases: if he does not work he gets nothing credited for that day. On the particular day 9.7.37 (to repeat what has been said above) 2nd Respondent did not remain with the men at the Chinese shop sewing up the bags. 1st Respondent's clerks were there. They gave orders and told the workmen to load the bags into P 104 and directed the lorry driver who conveyed the workmen and bags to P 104. At the loading applicant met with the accident.

Shortly Mr. Ross contended for 2nd Respondent that 2nd Respondent was not a Contractor: that the evidence shewed a partnership between the members of the gang as they worked on each job: that 2nd Respondent was as it were the partnership spokesman and conduit pipe for orders and able by his contacts to obtain jobs of work from the firms for the gang partnership in which 2nd Respondent was a partner and remunerated for his leadership by an extra share in the earnings. On applying tests to the facts it is to be noted that in relation to 2nd Respondent, applicant drew no fixed wage or retaining fee, need not work unless he liked, could leave without giving notice or pay in lieu of notice, had his share of the pay for a job settled up and credited each day: that 2nd Respondent received only one extra share as his remuneration for acting as spokesman of the gang, could make no profit other than that extra share out of the job, did not sublet the job to the gang, had no secrecy about the prices or sums paid for the job. Asked if he were liable to pay the workmen's wages in case 1st Respondent failed to pay for the work done 2nd Respondent said he would explain to the gang that 1st Respondent had not paid up and ask for time.

There is on the other hand the fact that 1st Respondent did not give the job directly to applicant nor personally select applicant for the job, while 2nd Respondent did put applicant to the job. This did not prevent the relationship of employer and workman being established between 1st Respondent and applicant. 1st Respondent employed a man selected for him by 2nd Respondent.

(Wilmersen v. Lyme and Hamburg S.S. Co.,[2]*).*

8. Evidence, too, was called which confirmed that the system of working described prevails among other gangs of Tamil long-shore men at Penang.

9. Among the authorities quoted is the case of *Bobbey v. Crosbie,*[1] set down in *Willis's* Workmen's Compensation at pages 127—128 as follows:—

> (A firm of drug grinders were in the habit of giving the unloading of barge-loads of sulphur consigned to them to one of the regular river-side labourers who brought a gang of men; W., a working labourer agreed to unload a barge into the firm's sacks and store in their warehouse for 1s. 6d. per ton; he brought a gang; evidence was given of a river-side practice that one of the labourers should collect such a gang, should distribute the amount received equally among the gang including himself, the other men giving back to the ganger 2d. for supplying the necessary plant; the men received their orders from W., but a member of the firm was present at the unloading to see that the sulphur was not split and to give directions as to the placing of the sacks in the warehouse; B. was a member of the gang and was injured and was held to be under a contract of service with the firm (**Bobby v. Crosbie** (1915) W.N. 406; 9 B.W.C.C. 142, reversing C.A., 8 B.W.C.C. 236, who had reversed the finding of the arbitrator.)

That case resembles the present case so closely that I am content to follow it and to allow it to decide the present case, and to answer the second and third questions above formulated.

10. The result of this case therefore is that I find 1st Respondent to be the employer of applicant and liable to pay compensation to the applicant for the accident: that 2nd Respondent is not a contractor within Section 15 nor employer of applicant, and that 2nd Respondent is not liable to pay compensation to applicant nor to indemnify 1st Respondent.

11. Applicant's earnings from January to July 9th 1937 while he worked with 2nd Respondent were $154.79 for 173 days: equivalent to a monthly wage of $26.84 raised to $27/-.: ½ monthly payment is $\frac{\$27}{4}$=$6.75.

First payment would have fallen due on 1.8.37 i.e. 16 days after expiration of waiting period of 7 days after date of disablement: that is up to and including November 1937 eight sums of $6.75=$54.00

Applicant received for July from 2nd Respondent $35.75 less $8.08 earned=$27.67 for which applicant should account thus leaving at this date $26.33 due up to date i.e. to 15.11.37 and, therefore $6.75 half monthly from 1.12.37. Order will be:—

1st Respondent to pay applicant $6.75 half monthly on and from 1.8.37 during temporary total disablement.

Claim against 2nd Respondent is dismissed.

No order for costs.

Claim against 1st Respondent allowed and against 2nd Respondent dismissed.